HOUSE BILL REPORT
E2SSB 6358

As Reported by House Committee On:
Criminal Justice & Corrections

Title: An act relating to improved collaboration regarding offenders with treatment orders.

Brief Description: Improving collaboration regarding offenders with treatment orders.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Hargrove and Stevens).

Brief History:
Committee Activity:
Criminal Justice & Corrections: 2/24/04, 2/25/04 [DPA].

Brief Summary of Engrossed Second Substitute Bill
(As Amended by House Committee)

- Requires mental health providers, chemical dependency treatment providers, and the Department of Corrections (DOC) to share records and reports with each other regarding offenders who are under supervision by the DOC and are subject to court-ordered treatment.
- Requires the DOC to ask offenders if they are subject to court-ordered mental health or chemical dependency treatment and requires each offender to disclose such information.
- Requires treatment providers to ask offenders if they are subject to supervision by the DOC and requires each offender to disclose such information.
- Requires the DOC and the Department of Social and Health Services (DSHS) to develop a training plan for information sharing on offenders under supervision who are subject to mental health or chemical dependency treatment orders.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: Do pass as amended. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Mielke, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kagi, Pearson and Veloria.

Staff: Yvonne Walker (786-7841).

Background:

There are several ways that a person can be involuntarily committed in Washington for mental health evaluation and treatment needs.

Civil Commitment - 71.05 RCW: A person may be involuntarily committed by a mental health professional designated by the county (MHPDC), who receives independently verified information alleging that the person:

(1) presents a likelihood of serious harm to others or him/herself; or
(2) is gravely disabled.

"Likelihood of serious harm" means that the person presents a substantial risk of physical harm upon one's own self, upon another, upon the property of another or the person has a history of violent acts and makes threats to the physical safety of another. "Gravely disabled" means that the person because of a mental disorder cannot provide for his or her own needs or manifests severe deterioration in routine functioning.

A police officer may also directly detain a person based on the same criteria, but the person must be seen by a mental health professional and by the MHPDC within a specified time period for evaluation, or to be released.

Criminal Commitment - 10.77 RCW: In addition, a person who is either "criminally insane" or "incompetent" may be involuntarily committed for some period of time. A person is "criminally insane" if he or she has been acquitted from a crime charged by reason of insanity and is a substantial danger to other persons, or presents a substantial likelihood of committing felonious acts. A person is "incompetent" to stand trial if he or she lacks the capacity to understand the nature of the proceedings or assist in his or her own defense.

No person may stand trial if they are found to be incompetent at the time of trial, or for any time which they remain to be incompetent. Generally, if a defendant has committed a felony or misdemeanor offense, and is found to be incompetent, he or she may be committed to the custody of the DSHS or the MHPDC for evaluation and treatment.

If a person is acquitted by reason of insanity, the commitment cannot exceed the maximum possible penal sentence for any charge for which he or she was acquitted. Professional persons must examine and report upon the mental condition of the defendant following the filing of such a defense. The defendant must be determined to have been insane at the time of the offense. If the defendant is found not to be a danger to other persons, and does not present a substantial likelihood of committing felonious acts, he or she may be discharged. Otherwise, the defendant is entered into a treatment and rehabilitation program.

Mental health records of inmates: Mental health providers are permitted to share mental

health records and reports with certain employees of the DOC for whom the information is necessary to their employment duties.

Upon a request to a mental health service provider, information relating to mental health services delivered to a person who is serving an indeterminate or determinate incarceration sentence, must be released to the DOC. The request for release of mental health records must be in writing and does not require the consent of the offender subject of the record. It is unclear whether treatment providers can share such records with the DOC relating to offenders on community supervision.

The DSHS and the DOC, in consultation with regional support networks, mental health service providers, mental health consumers, and advocates for persons with mental illness, must adopt rules regarding the release of such records, including the type and scope of information to be released. In addition, these rules must both facilitate the DOC's ability to carry out its responsibility of planning and ensure community protection.

All mental health information received by the DOC must remain confidential and may only be used for the purpose of completing a pre-sentence report for a court, providing supervision of an incarcerated person, and completing a release plan when assessing a person's risk to the community.

Information shared (mental health, chemical dependency, and the DOC records) and actions taken without gross negligence and in good faith are not a basis for any private civil cause of action.

HIPAA: The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a federal law related to the confidentiality of patient health care information. The HIPAA and its implementing regulations generally prohibit the disclosure of individually identifiable health information about a patient without the patient's authorization except for specified exceptions. These exceptions include: release pursuant to a judicial proceeding for law enforcement purposes; to avert a serious threat to health or safety; or to correctional institutions.

Summary of Amended Bill:

When a county designated mental health professional or a professional person has determined that a person has a mental disorder, and is otherwise committable, the cause of the person's mental disorder shall not make the person ineligible for commitment.

When a court issues an order for mental health or chemical dependency treatment, the order must contain a statement that if the person is, or becomes, subject to the DOC supervision, the person must notify his or her treatment provider and the person's mental

health or chemical dependency treatment information must be shared with the DOC. When a person is convicted in superior court, the judgment and sentence must contain an equivalent statement. Upon petition by a person who has no history of violent acts, the court may find that public safety would not be enhanced by the sharing of this person's information.

Mental health records of inmates: The requirement for mental health providers to share mental health records and reports of supervised inmates with the DOC is expanded. Mental health providers are required to share those records and reports with the DOC of those offenders who are under supervision by the DOC in the community (otherwise on community custody status) and for the purpose of completing risk assessment reports. The request from the DOC must be in writing and does not require the consent of the offender.

The Department of Corrections. When the DOC is determining an offender's risk management level, the DOC must ask and the offender must state whether or not he or she is subject to court-ordered mental health or chemical dependency treatment. When an offender discloses he or she is subject to court-ordered treatment, the DOC must request, and the offender must provide authorization for his or her records to be released to the DOC. The DOC must make a written request for such information from the treatment provider and must provide the offender with notice that the DOC is requesting his or her mental health and substance abuse treatment information from the provider. If the offender fails to provide authorization for his or her records, since the offender was notified, the disclosure of his or her mental records by a treatment provider does not require the offender's consent. An offender failing to inform the DOC that he or she is subject to court-ordered treatment is a violation of community custody status and as a result, the offender can be subject to sanctions if he or she is in the community or an infraction if the offender is in confinement. The offender's authorization and the written request are valid until the end of the offender's supervision.

If an offender fails to report to the DOC as required, or in an emergent situation, the treatment provider must share information related to mental health services delivered to the offender and, if known, where an offender may be found on an oral request from the DOC. The initial request may be written or oral. Oral requests must be subsequently confirmed with a written request which may be made by email or facsimile so long as the requesting person is clearly identified. Information released in response to an oral request is limited to a statement as to whether the offender is or is not being treated by a provider and the whereabouts of where the offender can be found. A request for treatment information does not require the consent of the offender.

Treatment Providers. When a mental health service provider conducts its initial assessment for a person receiving court-ordered treatment, the provider must inquire and the offender must state whether or not he or she is subject to supervision by the DOC.

When a person receiving court-ordered treatment or treatment ordered by the DOC discloses to the mental health service provider that he or she is subject to supervision by the DOC, the provider must notify the DOC that he or she is treating the offender and must notify the offender that his or her community corrections officer will be notified of the treatment. The notification may be written or oral and does not require the consent of the offender. If an oral notification is made, it must be confirmed by a written notification, made by email or facsimile, so long as the notifying mental health service provider is clearly identified.

When an offender is under court-ordered treatment in the community and the supervision of the DOC, and the treatment provider or community corrections officer becomes aware that the person is in violation of the terms of the court order, the designated chemical dependency specialist or the designated mental health professional must be notified of the violation. The treatment provider must request an evaluation for purposes of revocation of the conditional release or the less restrictive alternative (LRA).

When a designated chemical dependency specialist or county designated mental health professional becomes aware that an offender who is under court-ordered treatment in the community and the supervision of the DOC, is in violation of a treatment order or a condition of supervision, or he or she detains the offender, the designated chemical dependency specialist or mental health professional must notify the person's treatment provider and the DOC.

When an offender who is confined in a state correctional facility or is under supervision of the DOC in the community, is subject to a petition for involuntary treatment, the designated chemical dependency specialist or mental health professional must notify the DOC. The DOC must have an opportunity to present its risk assessment or other concerns to the court.

There is not duty on any treatment provider, chemical dependency specialist, or county designated mental health professional to provide offender supervision.

State Hospitals. When a state hospital admits a person with a history of violent acts from a correctional facility or who is or has been under the DOC supervision, the hospital must consult with the appropriate corrections and chemical dependency personnel and forensic staff to conduct a discharge review to determine whether the person presents a likelihood of serious harm and whether the person is appropriate for a LRA. If the person is returned to a correctional facility, the hospital must notify the correctional facility that the person was subject to a discharge review.

Jails. When a jail releases a person subject to a discharge review, the jail must notify the county designated mental health professional (CDMHP) or county designated chemical dependency specialist (CDCDS) 72 hours in advance of the release, or immediately prior to release if the jail did not have 72 hours notice. The CDMHP or the CDCDS as

appropriate, must evaluate the person within 72 hours of release.

The Department of Social and Health Services. Pursuant to an agreement between the two departments, the DSHS must, within available resources, provide the DOC with a list of names, last dates of services, and addresses of specific regional support networks and mental health service providers that delivered mental health services to offenders. The list must be made available electronically or by the most cost-effective means available.

Training Plan. The DOC and the DSHS must develop a training plan for information sharing on offenders under supervision who are subject to mental health or chemical dependency treatment orders. The DOC, the DSHS, and the Washington Association of Prosecuting Attorneys, must develop a model for multi-disciplinary case management and release planning for offenders with high resource needs in multiple service areas.

The DSHS, in consultation with the appropriate committees of the Legislature, must assess the current and needed residential capacity for crisis response and ongoing treatment services for persons in need of treatment for mental disorders and chemical dependency. In addition to considering the demand for persons with either a mental disorder or chemical dependency, the assessment must consider the demand for services for mentally ill offenders, and persons with co-occurring disorders, mental disorders caused by traumatic brain injury or dementia, and drug induced psychosis. An initial report assessing the types, number, and location of needed crisis response and emergency treatment beds, both in community hospital-based and in other settings, must be submitted to appropriate committees of the Legislature by November 1, 2004. A final report assessing the types, number, and location of beds needed for emergency, transitional, and ongoing treatment must be submitted to appropriate committees of the Legislature by December 1, 2005. Both reports must set forth the projected costs and benefits of alternative strategies and timelines for addressing identified needs.

Legislative staff must review and analyze the use of mental health resources in other state programs for providing community based and hospital based care for persons with mental illness, including information available through the Council of State Governments and the National Conference of the States Legislatures.

Amended Bill Compared to Engrossed Second Substitute Bill:

The amendment makes technical and clarifying amendments by correcting terminology, removing duplicative language, and clarifying the DOC's responsibility in offender's civil commitment petitions. It also adds a good faith immunity provision that states that actions (the sharing of records) taken without gross negligence and in good faith are not a basis for any private civil cause of action.

The original bill required mental health providers and chemical dependency providers to report to the DOC when they became aware that an offender was violating his/her

community supervision or treatment order. Provisions are added that state that those provisions in the act do not create a duty for the treatment providers to provide offender supervision.

Clarifications are made that provide that the DSHS study must include a report on the total number of mental health and chemical dependency beds which are available around the state.

Appropriation: None.

Fiscal Note: Requested on February 20, 2004.

Effective Date of Amended Bill: The bill takes effect on July 1, 2004, except for sections, 6, 20, and 21, which takes effect immediately.

Testimony For: There was a 4 year old boy that was stabbed to death by a mentally ill person in Aberdeen. The offender had previously been convicted of torturing animals to death and had even spent time in Western State Hospital. Once this person had been released from both jail and the hospital, the system lost track of her whereabouts.

The question that arises is what happens when a person is released from a mental health hospital and then he or she decompensates. This particular bill tries to deal with not only the exchange of information between mental health providers and the DOC, but also sets up a discharge review team. As a result, those persons that are released from a hospital or jail will have a little more attention paid to them for signs of decompensation.

The reciprocal exchange of information between the DOC and providers of mental health and chemical dependency treatment is a good idea. Due to concerns surrounding recent HIPAA and confidentiality laws, providers are running the risk of losing their ability to collaboratively share information regarding high risk offenders. This bill will help stop that loss from occurring. The statutory requirements for improved communication regarding offenders under the DOC supervision will help improve community public safety and will ensure that supervised offenders who are subject to treatment orders actually receive treatment.

Additionally, under current law, a mental health service provider does not have the authority to contact law enforcement or the DOC when they are aware of a crisis or emergency situation that poses a significant risk, without first having prior requests for that information from the DOC. The problem is that in many cases, the provider may be the first to have that information. This bill addresses that issue.

The training components in the bill are welcomed, which will help ensure the information sharing process will work as intended. The study which examines the capacity for crisis

care and ongoing treatment for people with a broad range of conditions should be amended to ensure that statewide capacity and resource issues surrounding psychiatric beds are included.

Testimony Against: The bill as it is currently drafted will have some unintended consequences. In particular, while the bill does not change the involuntary commitment criteria it does place new emphasis on who should be considered for involuntary commitment. As a result this may have an impact on beds. The bill also contains additional procedural requirements for civil commitment which may create additional hearings for civil commitment.

The section of the bill that requires treatment providers to report offenders who violate their DOC supervision, could put providers in the role of becoming probation or court compliance officers. This could be used by liability insurers as an additional burden on those individuals that need liability insurance and in turn, could make liability insurance more costly. (This was addressed in the amended version of the bill.)

There are also concerns in the bill regarding the fiscal cost of implementing the bill and also around the HIPAA issues. The sections relating to discharge reviews and orders granting relief need to be clarified. (This was addressed in the amended version of the bill.)

Persons Testifying: (In support) Senator Hargrove, prime sponsor; and Cathy Gaylord, Washington Community Mental Health Council.

(In support with concerns) Victoria Roberts, Department of Corrections; and Karl Brimner and Doug Allen, Department of Social and Health Services.

(Concerns) David E. Stewart, Pierce County, Regional Support Network.

Persons Signed In To Testify But Not Testifying: None.